Office-Supreme Court, U.S.
FILED
MAR 25 1966
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term 1965

No. 1152

LIFE ASSURANCE COMPANY OF PENNSYLVANIA,

*Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA,

*Appellee*

*On Appeal from the Supreme Court of Pennsylvania.*

## JURISDICTIONAL STATEMENT

HARRY J. RUBIN,
KREKSTEIN AND RUBIN,
500 Blackstone Building,
Harrisburg, Pennsylvania,
*Counsel for Appellant.*

MORRIS J. DEAN,
DEAN AND DEAN,
1315 Two Penn Center Plaza,
Philadelphia, Pennsylvania,
*Of Counsel.*

Murrelle Printing Company, Law Printers, 201-206 Lockhart Street, Sayre, Pa.

BLANK
PAGE

## INDEX


| | Page |
|---|---|
| Jurisdictional Statement: | |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 4 |
| Statement of the Case | 6 |
| The Questions Are Substantial | 11 |
| Appendix A—Opinion of Supreme Court of Pa. | 21 |
| Appendix B—Statute | 41 |


## TABLE OF CITATIONS


| | |
|---|---|
| Cases: | |
| Allied Stores of Ohio v. Bowers, 358 U.S. 522, 79 S. Ct. 437, 3 L. ed. 2d 480 | 14, 15 |
| Chicago, Burlington & Quincy R. Co. v. McGuire, 219 U.S. 549, 31 S. Ct. 259, 55 L. ed. 328 | 15 |
| City of Philadelphia et al. v. Smith, 412 Pa. 262, 194 A. 2d 177 | 16 |
| Commonwealth of Pennsylvania v. Girard Life Insurance Co., 305 Pa. 558, 158 Atl. 262 | 16 |
| Commonwealth of Pennsylvnia v. Life Assurance Company of Pennsylvania, 83 Dauphin Co. Reports 93, 35 Pa. D. & C. 2d 390, aff'd, 419 Pa. 370, 214 A. 2d 209 | 2 |
| Concordia Fire Insurance Company v. Illinois, 292 U.S. 535, 54 S. Ct. 830, 78 L. ed. 1411 | 14, 17, 18 |
| Geheral American Tank Car Corp. v. Day, 270 U.S. 367, 46 S. Ct. 234, 70 L. ed. 635 | 14 |

General Motors v. Washington et al., 377 U.S. 436, 84 S. Ct. 1564, 12 L. ed. 2d 430 ..... 2

Halliburton Oil Well Cementing Company v. Reily, 373 U.S. 64, 83 S. Ct. 1201, 10 L. ed. 2d 202 ..... 2, 3

In re Crawford's Estate, 313 Pa. 127, 169 Atl. 438 (1933) ..... 13

Louisville Gas and Electric Company v. Coleman, 277 U.S. 32, 48 S. Ct. 423, 72 L. ed. 770 ..... 15

Ott v. Mississippi Valley Barge Line Company, 336 U.S. 169, 69 S. Ct. 432, 93 L. ed. 585 ..... 19

Quaker City Cab Company v. Pennsylvania, 277 U.S. 389, 48 S. Ct. 553, 72 L. ed. 927 .....15, 17

Railway Express Agency v. Virginia, 358 U.S. 434, 79 S. Ct. 411, 3 L. ed. 2d 450 ..... 14

Reserve Life Insurance Co. v. Bowers, 380 U.S. 258, 85 S. Ct. 951, 13 L. ed. 2d 959 ..... 2, 14

Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 L. ed. 2d 424 ..... 13

Wisconsin v. J. C. Penney Company, 311 U.S. 435, 61 S. Ct. 246, 85 L. ed. 267 ..... 19

STATUTES (PENNSYLVANIA):

Act of June 1, 1889, Pamphlet Laws 420, 72 Pa. Stat. Ann. §§1871-1903 ..... 6

Act of May 17, 1921, Pamphlet Laws 682, §§201-202, 40 Pa. Stat. Ann. §§381-382 ..... 8

Act of April 9, 1929, Pamphlet Laws 343, §§1102-1104, 72 Pa. Stat. Ann. §§1102-1104 ..... 8

Act of May 16, 1935, Pamphlet Laws 208, 72 Pa. Stat. Ann. §§3420a-3420n ..... 6

Act of Feb. 21, 1961, Pamphlet Laws 33, 72 Pa. Stat. Ann. §§2270.1-2270.10 .....2, 3, 4, 6, 8, 9, 10, 19

IN THE SUPREME COURT OF THE UNITED STATES

---

**October Term 1965**

**No. ——**

---

LIFE ASSURANCE COMPANY OF PENNSYLVANIA,
*Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA,
*Appellee*

---

*On Appeal From the Supreme Court of Pennsylvania*

---

## JURISDICTIONAL STATEMENT

---

Appellant appeals from the judgment of the Supreme Court of Pennsylvania entered on November 9, 1965, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are substantial.

## OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 419 Pa. 370 and in 214 A. 2d 209. The opinion of the Court of Common Pleas of Dauphin County, Pennsylvania is reported in 35 Pa. D. & C. 2d 390 and in 83 Dauphin Co. Reports 93. A copy of the opinion of the Supreme Court of Pennsylvania is attached hereto as Appendix A.

## JURISDICTION

This suit was brought to contest the assessment against Appellant of the Pennsylvania tax on gross premiums imposed pursuant to the Pennsylvania Act of February 21, 1961, Pamphlet Laws 33, 72 Pa. Stat. Ann. §§2270.1-2270.10. Appellant contends that said statute violates the equal protection and due process clauses of the United States Constitution. The judgment of the Supreme Court of Pennsylvania was entered on November 9, 1965; and notice of appeal was filed in that Court and in the Court of Common Pleas of Dauphin County on January 26, 1966. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. §1257 (2) and §2101 (c). The following cases sustain the jurisdiction to review the judgment on direct appeal in this case: *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258, 85 S. Ct. 951, 13 L. ed. 2d 959 (1965), *General Motors v. Washington et al.*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. ed. 2d 430 (1964), *Hallibur-*

*ton Oil Well Cementing Company v. Reily*, 373 U.S. 64, 83 S. Ct. 1201, 10 L. ed. 2d 202 (1963).

The provisions of the Pennsylvania Act of February 21, 1961, Pamphlet Laws 33, 72 Pa. Stat. Ann. §§2270.1-2270.10, are set forth in Appendix B hereto.

## QUESTIONS PRESENTED

1. Does the Pennsylvania Act of February 21, 1961, Pamphlet Laws 33, 72 Pa. Stat. Ann. §§2270.1-2270.10, imposing a tax upon gross premiums received by domestic (Pennsylvania) life insurance companies and foreign (other states or nations) insurance companies of all kinds from business done within Pennsylvania violate the equal protection clause of the Fourteenth Amendment to the United States Constitution

   A. by, when viewed in conjunction with other Pennsylvania state tax acts applicable to insurance companies, subjecting Appellant to a cumulative state tax burden unreasonably discriminatory and unequal as between Appellant (a domestic stock life insurance company) and competing foreign stock insurance companies?

   B. by subjecting Appellant (a domestic life insurance company) to a tax to which other domestic insurance companies are not subject?

   C. by subjecting Appellant, to the extent of premiums received by it from the writing of accident and health insurance contracts, to a tax to which other domestic insurance companies writing similar contracts in competition with Appellant are not subject?

2. Does the Pennsylvania Act of February 21, 1961, Pamphlet Laws 33, 72 Pa. Stat. Ann. §§2270.1-2270.10, imposing a tax upon gross premiums received by domestic

*Questions Presented*

(Pennsylvania) life insurance companies and foreign (other states or nations) insurance companies of all kinds from business done within Pennsylvania violate the due process clause of the Fourteenth Amendment to the United States Constitution by, when viewed in conjunction with other Pennsylvania state tax laws applicable to insurance companies, subjecting Appellant to an exertion of state taxing power bearing no fiscal relation to the protection, opportunities and benefits given by Pennsylvania to Appellant?

## STATEMENT OF THE CASE

Appellant is a life insurance company incorporated under the laws of the Commonwealth of Pennsylvania. As such, Appellant is subject to the two percent tax on its gross premiums imposed by the Pennsylvania Act of February 21, 1961, Pamphlet Laws 33, 72 Pa. Stat. Ann. §§2270.1-2270.10 (hereinafter referred to as the Act of 1961).

Appellant is organized on the stock, not the mutual, principle. Accordingly, it is also subject to the Pennsylvania capital stock tax (five mills on the value of Appellant's capital stock), imposed by the Pennsylvania Act of June 1, 1889, Pamphlet Laws 420, 72 Pa. Stat. Ann. §§1871-1903, and the Pennsylvania corporate net income tax (six percent of Appellant's taxable income) imposed by the Pennsylvania Act of May 16, 1935, Pamphlet Laws 208, 72 Pa. Stat. Ann. §§3420a-3420n.

Under these various taxing statutes of Pennsylvania, only the single kind and class of insurance companies to which Appellant belongs—the domestic stock life insurance company—is subject to and liable for all three of the recited taxes. Insurance companies of both kinds (stock and mutual) and all classes (life, fire, casualty) from other states and nations (foreign companies) are subject to and liable for only the two percent tax on their gross premiums. Pennsylvania (domestic) companies doing business on the mutual principle and chartered as life insurance companies are subject to and liable for the tax on gross premiums but for no other tax, while other classes

of domestic mutual companies are subject to none of the three taxes. Domestic stock companies chartered to do a fire or casualty business, on the other hand, are subject to and liable for the capital stock and corporate net income taxes but are not subject to the tax on gross premiums.

This distinctive Pennsylvania state tax burden on insurance companies may be depicted in chart form:

| *Type of Company* | *Type of Tax* | | |
|---|---|---|---|
| | *Gross Premiums* | *Corporate Net Income* | *Capital Stock or Franchise* |
| Domestic | | | |
| Stock | | | |
| Life | X | X | X |
| Fire | | X | X |
| Casualty | | X | X |
| Mutual | | | |
| Life | X | | |
| Fire | | | |
| Casualty | | | |
| Foreign | | | |
| Stock | | | |
| Life | X | | |
| Fire | X | | |
| Casualty | X | | |
| Mutual | | | |
| Life | X | | |
| Fire | X | | |
| Casualty | X | | |

*Statement of the Case*

Under the relevant provisions of the Pennsylvania statute regulating the business of insurance (Act of May 17, 1921, Pamphlet Laws 682, §§201 and 202, 40 Pa. Stat. Ann. §§381 and 382), Appellant is entitled to conduct and does conduct both a life insurance business and an accident and health insurance business. The latter accounted for about twenty-eight percent of its gross premiums received during 1961. In carrying on its business as a life insurance company, Appellant competes with fifty-three other domestic companies (both stock and mutual) and two hundred foreign companies (both stock and mutual); while in the field of accident and health insurance Appellant is one of fifty-three domestic companies (both stock and mutual) and two hundred ninety-seven foreign companies (both stock and mutual) in competition with each other.

Following the assessment (referred to as a "settlement" under Pennsylvania law) of gross premiums tax against it by the Appellee, Appellant duly proceeded to contest the assessment in the manner provided by the Act of 1961 and the Pennsylvania Act of April 9, 1929, Pamphlet Laws 343, §§1102-1104 ("The Fiscal Code"), 72 Pa. Stat. Ann. §§1102-1104. It first filed a Petition for Resettlement with the Pennsylvania taxing departments. After this was refused, it filed a Petition for Review with the Pennsylvania Board of Finance and Revenue. This, too, was refused; and Appellant then filed an Appeal to the Court of Common Pleas of Dauphin County, Pennsylvania.

In its Appeal Appellant specified its objections to the Act of 1961 as required by §1104 of "The Fiscal Code", supra. In these objections Appellant raised all of the

questions sought to be reviewed here. Appellant repeated these objections to the Act of 1961 in its requests for findings of fact and conclusions of law to the Court of Common Pleas of Dauphin County and again in its exceptions to the findings made by that Court.

Appellant's contentions that the Act of 1961 violated both the equal protection and due process clauses of the United States Constitution were rejected by the Court of Common Pleas of Dauphin County. As that Court held, at the conclusion of its opinion:

> "We conclude, further, that the classification of domestic life insurance companies as opposed to all other types of domestic insurance companies for purposes of the gross premiums tax Act of 1961 by the legislature, does not contravene and is not repugnant to the due process, equal protection or uniformity of tax provision of either the Federal or State Constitutions. . ." 83 Dauphin Co. Reports 84, 99

For some reason the Court did not rule upon Appellant's contention that the Act of 1961 was constitutionally defective because of its discriminatory impact on domestic life insurance companies as contrasted with the tax impact on competing foreign life insurance companies.

Appellant raised all issues presented here in its brief on appeal to the Supreme Court of Pennsylvania. All of its contentions were rejected by that Court:

> ". . . The Act of 1961 makes no classification between appellant and its foreign competitors and, therefore, cannot be said to violate either the federal or state constitutions by reasons of classifications

made by other legislation. As to appellant and its foreign competitors, the Act of 1961 is both equal and uniform." 419 Pa. 370, 375, 214 A. 2d 209, 213

"It therefore follows that the distinctive treatment accorded domestic life and non-life insurance companies by the Act of 1961 is not violative of the equal protection and uniformity clauses of the federal or state constitutions." 419 Pa. 370, 389, 214 A. 2d 209, 217

". . . In our view, appellant has not met its burden of establishing that the classification made by the Act of 1961 clearly, palpably and plainly violates the state and federal constitutions. . . ." 419 Pa. 370, 389, 214 A. 2d 209, 220

"Nothing in the record suggests that the burdens imposed upon appellant by the Gross Premiums Tax Act bear no reasonable relationship to the benefits accorded it by the Commonwealth. Absent such a showing, we may not invalidate the tax on due process grounds." 419 Pa. 370, 375, 214 A. 2d 209, 213.

The Pennsylvania Supreme Court, therefore, decided in favor of the validity of the Pennsylvania Act of 1961 against Appellant's contention that this statute was repugnant to the Constitution of the United States.

## THE QUESTIONS ARE SUBSTANTIAL

Appellant advanced below and advances here constitutional arguments under both the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. These arguments may be summarily stated:

1. The Act of 1961, when viewed in conjunction with other Pennsylvania tax statutes applicable to insurance companies, places an unreasonably discriminatory burden of state taxation upon Appellant in comparison to that placed upon its foreign competitors. This discrimination arises from the fact that Appellant is subject, also, to the two other major state taxes; while its foreign competitors are not subject to the other two taxes or any equivalent burden of taxation.

2. The Act of 1961, in imposing a tax upon gross premiums received by Appellant and other domestic life insurance companies but not upon those received by any other domestic insurance companies, creates a discriminatory classification not based upon any real and substantial difference having some reasonable relation to the revenue-raising purpose of the legislation.

3. The Act of 1961, in imposing a tax upon gross premiums received by Appellant and other domestic life insurance companies from the writing of accident and health insurance contracts but not upon those re-

ceived by any other domestic insurance companies from the writing of identical contracts in competition with Appellant, unfairly discriminates against Appellant.

4. The Act of 1961 is a whimsical and capricious statute bearing no fiscal relation to the protection, benefits and opportunities given by Pennsylvania to Appellant when the Act is viewed in its historical and functional context.

The Supreme Court of Pennsylvania rejected each of these arguments.

1. With regard to the varying impact of the Pennsylvania tax burden upon domestic and foreign life insurance companies resulting from passage of the Act of 1961, the Court held that since no classification between such companies appears in the Act itself, the Act is valid.

2. With regard to the fact that tax is imposed upon domestic life insurance companies and no other domestic companies, the Court held that in a revenue-raising statute the principle that the classification must be reasonably related to its purpose is not applicable and that the existence of admittedly irrelevant differences between life insurance companies and other kinds of insurance companies is sufficient to sustain the discriminatory classification.

3. With regard to the taxation of premiums received by Appellant from the writing of accident and health insurance while similar premiums received by its competitors go untaxed, the Court held that since

the classification between domestic companies is otherwise valid, the discrimination here involved is an incidental one and must be sustained.

4. With regard to the capricious nature of the Act of 1961 and its lack of fiscal relation to the benefits extended Appellant by Pennsylvania, the Court made no direct holding. Its failure to do so, however, can only be viewed as a rejection of this explicitly raised issue. *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L. ed. 2d 424 (1965), *In re Crawford's Estate*, 313 Pa. 127, 169 Atl. 438 (1933).

This appeal presents a unique situation, one in which a state has discriminated against its domestic corporations. The extent and nature of this discrimination is made perfectly clear in the record before the Court, and Appellant submits that the invalidity of the discrimination is equally clear.

First, the approach taken by the Pennsylvania Supreme Court in rejecting Appellant's argument that it is an object of arbitrary discrimination when its tax burden is compared to that of its foreign competitors is obviously untenable. To compartmentalize each distinct taxing statute so that the cumulative tax burden is ignored invites the most illogical and unreasonable conclusions.

For instance, suppose a state imposes tax A on domestic companies and tax B on foreign companies. While tax A and tax B are different taxes, they represent an attempt to impose a substantially equal tax burden on domestic and foreign companies; and their nondiscriminatory effect is acknowledged. Then, suppose the state repeals tax A and replaces it with tax C, a tax which is, in

fact, identical to tax A except that it is imposed upon both domestic and foreign companies. Now, domestic companies pay only tax C; while foreign companies pay both tax B and tax C. Can the invidiously discriminatory nature of the new tax burden be denied? Yet, the Pennsylvania Supreme Court would deny it by shutting its eyes to everything but the fact that tax C itself applies to both foreign and domestic corporations.

The example given in the preceding paragraph is, in shortened form and scope, exactly the situation which has developed in Pennsylvania over a seventy-seven year history of insurance company taxation. Until passage of the Act of 1961 substantial equality existed; following and because of its passage, this balance was destroyed.

Failure of the Pennsylvania Supreme Court to regard the total Pennsylvania tax picture is contrary to the approach which this Court has taken or indicated as being proper. *General American Tank Car Corp. v. Day*, 270 U.S. 367, 46 S. Ct. 234, 70 L. ed. 635 (1926); *Concordia Fire Insurance Company v. Illinois*, 292 U.S. 535, 54 S. Ct. 830, 78 L. ed. 1411 (1934); *Railway Express Agency v. Virginia*, 358 U.S. 434, 79 S. Ct. 411, 3 L. ed. 2d 450 (1959); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 79 S. Ct. 437, 3 L. ed. 2d 480 (1959). The Court below failed to recognize this approach.

This Court has recently and summarily struck down a state statute which discriminated between foreign and domestic corporations. *Reserve Life Insurance Co. v. Ohio*, 380 U.S. 258, 85 S. Ct. 951, 13 L. ed. 2d 959 (1965). Reference to the record in that case reveals a condition of non-equivalence of taxation between foreign and do-

mestic companies similar to the one involved here. A similar result should follow.

Although this Court has never held that a domestic corporation cannot raise an issue under the equal protection clause of the Fourteenth Amendment in objecting to a statute of its own state, the concurring Justices in *Allied Stores of Ohio v. Bowers,* supra, did indicate doubt on this point. They based their views on the function of the equal protection clause as an instrument of federalism. Appellant believes this position is unwarranted in light of the history and purpose of the clause; but since this question is a substantial one, it also deserves plenary consideration by the Court.

Second, the rejection by the Pennsylvania Supreme Court of Appellant's argument with regard to the classification between domestic life insurance companies and other domestic companies is equally untenable. The only case cited by it to support its position that the classification appearing in a taxing statute need not be related to the revenue-raising purpose of the statute is not at all pertinent. *Chicago, Burlington & Quincy R. Co. v. McGuire,* 219 U.S. 549, 31 S. Ct. 259, 55 L. ed. 328, dealt with the validity of a state statute under the due process clause of the Fourteenth Amendment and contains no reference to the view set forth by the Pennsylvania Supreme Court.

This view is contrary to every decided case of this Court. These cases have held uniformly that classifications contained in a taxing statute must be reasonably related to the purpose of raising revenue. *Louisville Gas and Electric Company v. Coleman,* 277 U.S. 32, 48 S. Ct. 423, 72 L. ed. 770 (1928); *Quaker City Cab Company v.*

*Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. ed. 927 (1928).

Furthermore, the latest decision of the Pennsylvania Supreme Court which discussed this issue prior to the present case is in complete accord with Appellant's position and the above-cited decisions of this Court. In *City of Philadelphia et al. v. Smith*, 412 Pa. 262, 194 A. 2d 177 (1963), the Court stated:

> "Unfortunately, the factors distinguishing gas from electric companies of which the lower court took judicial notice . . . do not overly impress us as differences calling for different tax treatment albeit they might easily sustain different regulatory treatment. . . . If, indeed, real differences *reasonably related to a different tax policy* exist between electric and gas companies, then the statute must be sustained. . . ." 412 Pa. 262, 269-70, 194 A. 2d 177, 180 (emphasis supplied).

This clearly and correctly stated position makes the present decision all the more inexplicable.

Cases in which the classification made in a taxing statute has been upheld involved distinctions reasonably related to taxing policies. Thus, in the leading Pennsylvania case of *Commonwealth v. Girard Life Insurance Co.*, 305 Pa. 558, 158 Atl. 262 (1932), the vastly different sources of the receipts and destinations of any profit justified a classification between stock and mutual insurance companies for tax purposes. Such differences do not exist here.

*Questions Are Substantial*

If the same analysis is made here as was made by this Court in *Quaker City Cab Company v. Pennsylvania*, supra, the invalidity of the Act of 1961 becomes apparent. The tax can be laid upon the receipts of other domestic insurance companies as conveniently as upon those of domestic life companies. Nothing about the tax is peculiarly applicable to domestic life companies as contrasted to other domestic insurance companies. The tax is not imposed upon domestic life companies in lieu of any other tax imposed upon other domestic insurance companies. There is no difference in the source of the receipts between domestic life companies and other domestic insurance companies which justifies different tax treatment. In short, the attempted classification between domestic companies is arbitrary and unreasonable.

Third, imposition of the present tax on gross premiums received by Appellant from its substantial accident and health insurance business while similar premiums received by other domestic insurance companies from an identical business remain untaxed, is directly and obviously discriminatory. The unfairness of this discrimination is self-evident.

The Pennsylvania Supreme Court refused to disturb this discrimination even though it admitted that Appellant was disadvantaged thereby in its business operations. It regarded the discrimination as merely incidental to the overall classification which it had upheld.

This conclusion of the Pennsylvania Supreme Court is directly in contradiction to the holding of this Court in *Concordia Fire Insurance Company v. Illinois*, 292 U.S.

535, 54 S. Ct. 179, 71 L. ed. 372 (1926). One of the issues in that case was whether casualty insurance premiums received by a foreign fire insurance company could be included in that company's state tax base while similar premiums received by a competing foreign casualty company were not included. This Court held that imposition of tax on these premiums

> ". . . works a very real and prejudicial discrimination against the fire insurance companies and in favor of the casualty companies in respect of competitive casualty businesses of the same character, conducted in the same way and in the same territory". 292 U.S. 535, 549, 54 S. Ct. 830, 835, 78 L. ed. 1411, 1420.

The competition between Appellant and other domestic companies for the same accident and health business is stipulated as a fact in this case. In light of this and of the *Concordia* holding, the Act of 1961 can only be considered in violation of the constitutional requirement of equal protection.

Therefore, even if this Court believes that the Act of 1961 is otherwise valid, it should recognize the substantial nature of the discrimination with regard to accident and health premiums and act to eliminate this discrimination.

Fourth, this Court has regularly tested the validity of a state taxing statute under the due process clause of the Fourteenth Amendment by asking if the statute in question is reasonably related to the protection, benefits

and opportunities afforded by the State to the taxpayer. *Ott v. Mississippi Valley Barge Line Company*, 336 U.S. 169, 69 S. Ct. 432, 93 L. ed. 585 (1949); *Wisconsin v. J. C. Penney Company*, 311 U.S. 435, 61 S. Ct. 246, 85 L. ed. 267 (1940).

The record history of insurance company taxation by Pennsylvania shows that all domestic insurance companies occupied an identical status and a similar relationship to the State prior to passage of the Act of 1961. What was given by the State was the same to all; what was given to the State was the same by all. With no change occurring in the status or relationship to the State of the domestic life insurance company, it suddenly was required to pay a substantially greater return to Pennsylvania as a result of enactment of the Act of 1961. This change can only be considered capricious and unjustified by any state of facts. By applicable standards of due process, the Act of 1961 must fall.

In all respects, therefore, the judgment and opinion of the Supreme Court of Pennsylvania, in upholding the Act of 1961 against Appellant's express contentions that the Act violates the equal protection and due process clauses of the Fourteenth Amendment, presents a case within the appeal jurisdiction of this Court. The decision of the Supreme Court of Pennsylvania, moreover, fails to apply the relevant constitutional standards inherent in those clauses in a manner consistent with the meaning of these standards as interpreted by this Court. Appellant believes that the questions presented by this Appeal are substantial and important and that this Court should note

probable jurisdiction in order that these questions may receive plenary consideration.

Respectfully submitted,

HARRY J. RUBIN,
KREKSTEIN AND RUBIN,
500 Blackstone Building,
Harrisburg, Pennsylvania,
*Counsel for Appellant.*

MORRIS J. DEAN,
DEAN AND DEAN,
1315 Two Penn Center Plaza,
Philadelphia, Pennsylvania,
*Of Counsel.*

## APPENDIX A

### OPINION OF THE SUPREME COURT OF PENNSYLVANIA

(419 Pa. 370)

OPINION BY MR. JUSTICE ROBERTS, November 9, 1965:

This appeal is by the Life Assurance Company of Pennsylvania, a stock life insurance company organized under the laws of this Commonwealth, from an order of the Court of Common Pleas of Dauphin County, sitting as the Commonwealth Court, sustaining the imposition of a gross premiums tax under the Act of February 21, 1961, P. L. 33, 72 P.S. §§2270.1-2270.10.[1] Appellant attacks the constitutionality of the Act and the interpretation given certain language contained therein by various agencies of the Commonwealth and by the court below.

The Act of 1961 imposes upon domestic *life* insurance companies a tax at the rate of 2% on the premiums received from business done within the Commonwealth.[2]

[1] Hereinafter referred to as the Act of 1961.

[2] Act of February 21, 1961, P. L. 33, §§1, 2, 72 P.S. §§2270.1, 2270.2. Section 2 of the Act provides for the imposition of the tax upon "every insurance company" as defined by the Act. Act of February 21, 1961, P. L. 33, §2, 72 P.S. §2270.2. Section 1 defines the term "insurance company" to include "every insurance company . . . incorporated . . . under the laws of other states . . . engaged in transacting insurance business of any kind or classification within this Commonwealth; and every life insurance company . . . organized . . . under any law of this Commonwealth . . . ." Act of February 21, 1961, P. L. 33, §1, 72 P.S. §2270.1.

It imposes an identical tax upon all foreign insurance companies without regard to the type of insurance coverage provided.[3]

Appellant filed a Gross Premiums Tax Report for the year ending December 31, 1961, but failed to remit the tax due thereunder claiming that the Act of 1961 was invalid. Petitions contesting the imposition of the tax having been denied by the appropriate state departments and boards,[4] appellant perfected an appeal to the court below where the Act and the tax imposed were sustained.

In urging reversal of the decision below, appellant bases its numerous objections to the tax sought to be imposed upon both statutory and constitutional grounds.

Appellant first argues that the imposition of a gross premiums tax upon domestic life insurance companies results in their being subjected to a Pennsylvania tax burden greater than that imposed upon competing foreign insurance companies. The inequality is said to arise by reason of the fact that both foreign and domestic insurance companies pay the same 2% gross premiums tax under the Act of 1961, while only domestic life insurance companies pay in addition a capital stock[5] and net income[6] tax. Therefore, appellant argues, domestic life insurance

---

[3] Act of February 21, 1961, P. L. 33, §§1, 2, 72 P.S. §§2270.1, 2270.2.

[4] See Act of February 21, 1961, P. L. 33, §5, 72 P.S. §2270.5.

[5] Act of June 1, 1889, P. L. 420, as amended, 72 P.S. §§1871-1903.

[6] Act of May 16, 1935, P. L. 208, as amended, 72 P.S. §§3420a-3420n.

companies are placed at a disadvantage to their foreign competitors and denied the equal protection and uniformity of treatment which the federal[7] and state[8] constitutions guarantee.[9]

We can not agree. The Act of 1961 imposes precisely the same tax upon foreign insurance companies as is imposed upon domestic life insurance companies, such as appellant. What appellant seeks is a determination that a tax which makes no distinction in its treatment of appellant and its foreign competitors is unconstitutional because of burdens placed upon domestic life insurance companies by other taxing measures. Such an argument is misdirected. The Act of 1961 makes no classification between appellant and its foreign competitors and, there-

---

[7] U. S. Const. amend. XIV, §1.

[8] Pa. Const. art. 9, §1. So far as the reasonableness of classifications made for the purposes of taxation is concerned, the uniformity clause of the Constitution of Pennsylvania and the equal protection clause of the Constitution of the United States stand in pari materia. *Commonwealth v. Budd Co.*, 379 Pa. 159, 167, 108 A. 2d 563, 566 (1954); *Commonwealth v. Firemen's Fund Ins. Co.*, 369 Pa. 560, 565, 87 A. 2d 255, 258 (1952); *Commonwealth v. Girard Life Ins. Co.*, 305 Pa. 558, 562, 158 Atl. 262, 263 (1932).

[9] Appellant also urges that the Act of 1961 is violative of the due process clause of the federal constitution, U. S. Const. amend. XIV, §1. We find no merit in this contention. Nothing in the record suggests that the burdens imposed upon appellant by the Gross Premiums Tax Act bear no reasonable relationship to the benefits accorded it by the Commonwealth. Absent such a showing, we may not invalidate the tax on due process grounds. See *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S. Ct. 432 (1949); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246 (1940). We are unable to say that "the state has [not] given anything for which it can ask return." *Wisconsin v. J. C. Penney Co.*, supra at 444, 61 S. Ct. at 250.

fore, cannot be said to violate either the federal or state constitutions by reasons of classifications made by other legislation. As to appellant and its foreign competitors, the Act of 1961 is both equal and uniform.[10]

Appellant next contends that the Act of 1961 is violative of these same constitutional provisions by reason of the fact that domestic life insurance carriers are taxed thereunder whereas domestic non-life carriers are not similarly burdened.

While the Act, for purposes of imposing a gross premiums tax, distinguishes between domestic life and all other domestic insurance carriers, such distinction does not in and of itself rise to a constitutional violation. See *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 79 S. Ct. 437 (1959); *State Bd. of Tax Comm'rs of Indiana v. Jackson,* 283 U.S. 527, 51 S. Ct. 540 (1931); *Jones &*

---

[10] In support of its novel assertion that the Act of 1961, although uniform and equal in its treatment of appellant and its foreign competitors, results in arbitrary and unreasonable discrimination in violation of the equal protection clause of the federal constitution, appellant relies upon the recent case of *Reserve Life Ins. Co. v. Bowers,* U.S. , 85 S. Ct. 951 (1965) (per curiam). *Reserve Life Ins. Co. v. Bowers* will not support such a contention. In that case, as well as in every other case cited by appellant in support of its position, see *Wheeling Steel Corp. v. Glander,* 337 U.S. 562, 69 S. Ct. 1291 (1949); *Power Mfg. Co. v. Saunders,* 274 U.S. 490, 47 S. Ct. 678 (1927); *Hanover Fire Ins. Co. v. Harding,* 272 U.S. 494, 47 S. Ct. 179 (1926); *Southern Ry. Co. v. Greene,* 216 U.S. 400, 30 S. Ct. 287 (1910); the classification arose out of the contested legislation and not as the result of the cumulative effect of other, unrelated measures. We are unable to find any authority for the proposition that a concededly non-discriminatory tax becomes constitutionally tainted merely because other taxes to which the appellant is subject accord distinctive treatment to various classes of taxpayers.

*Laughlin Tax Assessment Case*, 405 Pa. 421, 175 A. 2d 856 (1961); *Commonwealth v. Girard Life Ins. Co.*, 305 Pa. 558, 158 Atl. 262 (1932); *Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 118 Atl. 394, aff'd, 260 U.S. 245, 43 S. Ct. 83 (1922); *Germania Life Ins. Co. v. Commonwealth*, 85 Pa. 513 (1877); *Coe v. Duffield*, 185 Pa. Superior Ct. 532, 138 A. 2d 303 (1958). By necessity a wide discretion must be conceded to the Legislature in the classification of various businesses or occupations for purposes of taxation. *State Bd. of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 51 S. Ct. 540, 543 (1931); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 30 S. Ct. 578 (1910); see *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437 (1959); *Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 118 Atl. 394, aff'd, 260 U.S. 245, 43 S. Ct. 83 (1922). The equal protection clause imposes no iron rule of equality prohibiting that degree of flexibility and variety appropriate to reasonable schemes of taxation. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 525, 79 S. Ct. 437, 440 (1959).

The only constitutional limitation placed upon the power of the Legislature to distinguish between various entities for purposes of taxation is that their basis for doing so be reasonable. See *Allied Stores of Ohio, Inc. v. Bowers*, supra, at 527, 79 S. Ct. at 441; *State Bd. of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 51 S. Ct. 540, 543 (1931); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 572, 30 S. Ct. 578, 580 (1910); *Jones & Laughlin Tax Assessment Case*, 405 Pa. 421, 433-34, 175 A. 2d 856, 862 (1961); *Commonwealth v. Lukens*, 312 Pa. 220, 223, 167 Atl. 167, 169 (1933). And the burden of showing that the classification employed by the Legislature is not rea-

sonable is upon the party attacking the tax. Cf. *Chartiers Valley Jt. Schools v. Allegheny County Bd. of School Dir's*, 418 Pa. 520, 546, 211 A. 2d 487, 501 (1965). "Especially is this so in light of the often reaffirmed rule that . . . '[legislation] will not be declared unconstitutional unless it *clearly, palpably* and *plainly* violates the Constitution.'" Ibid. (Citations omitted.)

Thus, the burden rests upon appellant to establish that the distinctive treatment accorded by the Act of 1961 to domestic life insurance companies is unreasonable. This the appellant seeks to do by arguing that the classification made by the Act of 1961 between domestic life and non-life insurance companies bears no reasonable relationship to the purpose of the legislation and is therefore invalid. It concedes that life insurance companies differ from casualty and fire insurance companies and for purposes of ensuring solvency and stability may be accorded different treatment. However, appellant argues that they may not be so classified for tax purposes on the ground that the purpose of raising revenue admits of no constitutionally permissible distinction between them.

In effect appellant asserts that the equal protection clause requires that the classification between domestic life and domestic non-life insurance companies made by the Act of 1961 bear some reasonable relationship to the end sought to be obtained by that Act. While the principle that there must be a reasonable relationship between the classification made by the legislation and its purpose is undoubtedly true in some contexts, it has no application to a measure whose sole purpose is to raise revenue.[11]

[11] The state may not classify for purposes of regulation unless such classification bears a reasonable relationship to the pur-

The application of appellant's theory would lead not only to the conclusion that the entire insurance industry must be taxed identically or not at all, a conclusion in conflict with our decisions in *Commonwealth v. Girard Life Ins. Co.*, 305 Pa. 558, 158 Atl. 262 (1932) and *Germania Life Ins. Co. v. Commonwealth*, 85 Pa. 513 (1877), but would also require that all industries with the same general resources be taxed identically without regard to distinctions between them which may prompt a rational legislative determination to tax one and not another. Neither the federal nor state constitution imposes such a straitjacket upon the Legislature. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437 (1959); *State Bd. of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 51 S. Ct. 540 (1931). So long as the classification imposed is based upon some standard capable of reasonable comprehension, be that standard based upon ability to produce revenue or some other legitimate distinction, equal protection of the law has been afforded. See *Allied Stores of Ohio, Inc. v. Bowers*, supra at 527, 79 S. Ct. at 441; *Brown-*

---

pose of the regulation. However, where the state seeks to raise revenue, it need not justify any distinction drawn between the taxed and non-taxed with respect to the raising of revenue so long as some other reasonable basis for treating the various classes differently exists. Where such distinction exists, the wisdom of the legislative policy of taxing one class and not another is not a matter for the courts. "Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and an earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U.S. 549, 569, 31 S. Ct. 259, 263 (1911).

*Forman Co. v. Kentucky,* 217 U.S. 563, 573, 30 S. Ct. 578, 580 (1910).

In terms of our previous decisions and the decisions of the Supreme Court of the United States the essential question in testing the validity of such measures as the Act of 1961 is whether the distinctive treatment accorded rests upon substantial differences between the subjects so classified. See *Allied Stores of Ohio v. Bowers,* supra at 527, 79 S. Ct. 441; *State Bd. of Tax Comm'rs of Indiana v. Jackson,* 283 U.S. 527, 537, 51 S. Ct. 540, 543 (1931); *Ohio Oil Co. v. Conway,* 281 U.S. 146, 159, 50 S. Ct. 310, 313 (1930); *Bell's Gap R. Co. v. Commonwealth,* 134 U.S. 232, 237, 10 S. Ct. 533, 535 (1890); *Jones & Laughlin Tax Assessment Case,* 405 Pa. 421, 434, 175 A. 2d 856, 863 (1961); *Turco Paint & Varnish Co. v. Kalodner,* 320 Pa. 421, 433, 184 Atl. 37, 43 (1936). And where such distinctions rest upon differences recognized and acted upon by the business world, it is not within the province of the courts to intrude. *Jones & Laughlin Tax Assessment Case,* 405 Pa. 421, 434, 175 A. 2d 856, 863 (1961). So long as the classification is neither capricious nor arbitrary, there is no denial of the equal protection of the law. *Allied Stores of Ohio, Inc. v. Bowers,* supra at 527, 79 S. Ct. at 441; *State Bd. of Tax Comm'rs of Indiana v. Jackson,* supra at 537, 51 S. Ct. at 543; *Brown-Forman Co. v. Kentucky,* 217 U.S. 563, 573, 30 S. Ct. 578, 580 (1910).

In the past this Court has sustained the distinctive tax treatment of various types of insurance companies where the differences found to exist between them precluded the conclusion that one class was being singled out for arbitrary treatment. See *Commonwealth v. Penna. Threshermen & Farmers' Mut. Cas. Ins. Co.,* 339 Pa. 62,

14 A. 2d 295 (1940); *Commonwealth v. Girard Life Ins. Co.*, 305 Pa. 558, 158 Atl. 262 (1932); *Germania Life Ins. Co. v. Commonwealth*, 85 Pa. 513 (1877).[12] It therefore follows that for purposes of taxation all insurance companies need not be accorded identical treatment. See ibid. As this Court has pointed out in another context, the Legislature may distinguish for purposes of taxation activities which are sufficiently unique despite the fact that the subjects so taxed are but one segment of a larger class engaged in similar activity. *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 432-33, 184 Atl. 37, 43-44 (1936); see *Allied Stores of Ohio, Inc. v. Bowers*, supra at 528, 79 S. Ct. at 441; *Stebbins v. Riley*, 268 U.S. 137, 142, 45 S. Ct. 424 (1935); *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 21 S. Ct. 43 (1900).

In the application of these general principles to the instant case, it is significant to note that the Legislature established various classifications of insurance companies for purposes unrelated to the matter of taxation in the Insurance Company Law of 1921, Act of May 17, 1921, P. L. 682, 40 P.S. §§341-991. This Act, which deals with the organization of insurance companies, provides for several distinct classes of carriers including stock life, mutual life, stock fire, stock marine, stock fire and marine, stock casualty, and mutual non-life companies. Act of May 17, 1921, P. L. 682, §201, 40 P.S. §381. Although the creation of such classes does not of itself necessarily determine the propriety of the classification made in the in-

---

[12] Cf. *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940); *Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 118 Atl. 394, aff'd, 260 U.S. 245, 43 S. Ct. 83 (1922); *Knisely v. Cotterel*, 196 Pa. 614, 46 Atl. 861 (1900).

stant case, as the court below correctly noted, "the very fact of the existence of . . . [such] classifications, even for the limited purpose of that Act, over so long a period of time, recognized and accepted by both the Commonwealth and the industry, . . . tends to establish that [the] classification of insurance companies, including the separate classification of life insurance companies in a taxing statute, is neither specious, arbitrary, nor capricious on the part of the legislature."[13]

Life insurance, by its very nature, is basically different from other types of insurance. Whereas casualty insurance is pure risk insurance, life insurance, with the exception of term policies, provides for investment as well. See Note, The Pennsylvania Life Insurance Exemption Statute, 22 U. Pitt. L. Rev. 757, 760 (1961). Moreover, unlike casualty insurance, life insurance is generally testamentary in nature. It is designed in many instances to provide for the creation and disposition of an insurance estate. See Lowndes, The Constitutional Basis for Taxing Life Insurance Under the Federal Estate Tax, 17 U. Pitt. L. Rev. 346, 349 (1956).

Aside from whatever significance may be attributed to these and other differences between life and non-life insurance, they are sufficient to justify and have in the past prompted distinctive legislative treatment for purposes other than taxation. Life insurance companies are permitted to write health and accident policies, as does in fact appellant, whereas life insurance may be sold only by those companies formed for the express purpose of so do-

---

[13] *Commonwealth v. Life Assurance Co. of Pa.*, 83 Dauphin Co. Rpts. 93, 96 (1964).

ing.[14] Moreover, the Legislature has imposed varying capitalization requirements for life and non-life insurance companies depending upon the type and combination of coverage provided. See Act of May 17, 1921, P. L. 682, §206, as amended, 40 P.S. §386 (Supp. 1964). The public interest in ensuring stability and fair dealing on the part of insurance companies has prompted a high degree of governmental intervention in the insurance industry. See Kimball & Hanson, The Regulation of Speciality Policies in Life Insurance, 62 Mich. L. Rev. 167, 180-81 (1963). In the process of regulation, life insurance companies have traditionally been singled out for specialized treatment. See, e.g., Act of May 17, 1921, P. L. 789, §301, as amended, 40 P.S. §71; Act of May 17, 1921, P. L. 682, §§410-410A, as amended, 40 P.S. §§510-510.1; Act of May 17, 1921, P. L. 682, §§404-406.2, as amended, 40 P.S. §§504-506.2.

In light of these distinctions, legitimately and historically drawn, we are unable to conclude that the classification objected to is arbitrary, capricious or discriminatory. It therefore follows that the distinctive treatment accorded domestic life and non-life insurance companies by the Act of 1961 is not violative of the equal protection and uniformity clauses of the federal or state constitutions.[15]

---

[14] See Act of May 17, 1921, P. L. 682, §202, as amended, 40 P.S. §382.

[15] Appellant seeks support for its position in the decision of *Quaker City Cab Co. v. Commonwealth*, 277 U.S. 389, 48 S. Ct. 553 (1928). However, in our view, the current position of the Supreme Court of the United States is more correctly represented by the dissenting opinions of Justices Brandeis, Holmes, and Stone. Id. at 554-58.

Appellant also relies upon *Reserve Life Ins. Co. v. Bowers*, U.S. , 85 S. Ct. 951 (1965); *Wheeling Steel Corp. v.*

Appellant, however, urges that even if the overall classification is constitutionally permissible, the imposition of a tax upon the gross premiums received by domestic life insurance carriers from the sale of accident and health contracts, while premiums received by domestic non-life carriers from the sale of identical contracts remain untaxed, results in an unconstitutional discrimination and invalidates the entire tax. In the conduct of its business, appellant sells both life insurance and health and accident insurance. In 1961, it received a total of $2,261,418 in premiums, 28% of which was derived from its accident and health policies. Therefore, appellant contends, the imposition of a gross premiums tax on the proceeds derived from the sale of accident and health policies results in an unconstitutional economic discrimination invalidating the tax with respect to all of its premium income.

Assuming that appellant is placed at some disadvantage to non-life insurance companies by reason of the taxation of its accident and health premiums, the crucial question remains whether such disadvantage is prohibited by the equal protection and uniformity clauses. For the purposes of taxation, the Act of 1961 creates a separate classification of life insurance companies which, as we have previously stated, is not proscribed by either the federal or state constitution. Under the Act, a tax is imposed upon all the premiums received by insurance com-

---

*Glander*, 337 U.S. 562, 69 S. Ct. 1291 (1949); and *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 57 S. Ct. 838 (1937). In each of these decisions, the classification objected to disadvantaged foreign competitors. We do not view the considerations therein involved appropriate to the instant case. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530-33, 79 S. Ct. 437, 443-44 (1959) (Brennan, J., concurring).

panies so classified. The fact that the tax also reaches to premiums derived from accident and health insurance policies is but an incidental effect of the overall classification.

As this Court has previously held, "the power to classify . . . is not limited to cases where the commodities [classified] are unlike or . . . not competitive, but, on the contrary, may be based on other grounds and the courts cannot . . . interfere . . . where . . . 'the classification is not an arbitrary one, but one which actually exists in the business world.' " *Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 463, 118 Atl. 394, 399, aff'd, 260 U.S. 245, 43 S. Ct. 83 (1922). (Citations omitted.)[16] The Supreme Court of the United States has on numerous occasions refused to invalidate a tax solely on the basis of economic disadvantage where the classification was not otherwise arbitrary.

---

[16] In *Heisler v. Thomas Colliery Co. Inc.*, the classification sustained permitted distinctive tax treatment of anthracite and bituminous coal. Cf. *Commonwealth v. Penna. Threshermen & Farmers' Mut. Cas. Ins. Co.*, 339 Pa. 62, 14 A. 2d 295 (1940) (sustaining separate classification for purposes of taxation of mutual life or fire insurance companies and mutual casualty insurance companies); *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940) (sustaining separate classification for purposes of taxation of open and closed parking businesses); *Commonwealth v. Girard Life Ins. Co.*, 305 Pa. 558, 158 Atl. 262 (1932) (sustaining separate classification for purposes of taxation of mutual and stock life insurance companies); *Knisely v. Cotterel*, 196 Pa. 614, 46 Atl. 861 (1900) (sustaining separate classification for purposes of taxation of retailers and wholesalers); *Germania Life Ins. Co. v. Commonwealth*, 85 Pa. 513 (1877) (sustaining separate classification for purposes of taxation of foreign and domestic insurance companies). See also *State Bd. of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 51 S. Ct. 540 (1931) and cases cited therein.

See *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 79 S. Ct. 437 (1959); *Union Bank & Trust Co. v. Phelps,* 288 U.S. 181, 53 S. Ct. 321 (1933); *State Bd. of Tax Comm'rs of Indiana v. Jackson,* 283 U.S. 527, 51 S. Ct. 540 (1931); *Stebbins v. Riley,* 268 U.S. 137, 45 S. Ct. 424 (1925); *Rast v. Van Deman & Lewis Co.,* 240 U.S. 342, 36 S. Ct. 370 (1916); *American Sugar Refining Co. v. Louisiana,* 179 U.S. 89, 21 S. Ct. 43 (1900).

In *Allied Stores of Ohio, Inc. v. Bowers,* supra, the Supreme Court of the United States sustained a tax imposed upon merchandise held in storage which exempted such merchandise if held by nonresidents. Despite the fact that this classification resulted in a tax advantage in favor of nonresidents, the Court sustained it on the theory that the state may have had other reasonable grounds for according residents and nonresidents distinctive treatment. Once having determined that a classification between residents and nonresidents could not be deemed arbitrary and unreasonable, the resulting economic disadvantage was not found to be violative of the equal protection clause. See also *Central Railroad Co. v. Pennsylvania,* 370 U.S. 607, 616, 82 S. Ct. 1297, 1304 (1962).

The conclusion that economic discrimination is not necessarily the determinative factor in testing the validity of a classification was reached by this Court in its decision in *Commonwealth v. Girard Life Ins. Co.,* 305 Pa. 558, 158 Atl. 262 (1932). In that case, we sustained a classification of insurance companies for purposes of taxation based upon their corporate structure. The tax was imposed upon stock life insurance companies while mutual life insurance companies were exempted, even though both classes competed for the same business.

In sustaining the tax, this Court pointed out that the test to be applied was whether there was a reasonable distinction and difference between the classes of taxpayers sufficient to justify different tax treatment under the Act. *Commonwealth v. Girard Life Ins. Co.*, supra, at 564, 158 Atl. at 263. The fact that mutual and stock companies were in competition did not affect the result once it had been concluded that their attributes were sufficiently different to permit the Legislature to take such differences into account in fixing its tax policy. See *Commonwealth v. Girard Life Ins. Co.*, supra, at 564-65, 158 Atl. at 263-64. As the Court stated, "[Competition between the two classes of insurance companies, the taxed and non-taxed], may be admitted and not affect the validity of the tax, provided there is a substantial difference between . . . the two types of companies." *Commonwealth v. Girard Life Ins. Co.*, supra, at 565, 158 Atl. at 264. See *State Bd. of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 51 S. Ct. 540 (1931); *Dufour v. Maize*, 358 Pa. 309, 56 A. 2d 675 (1948); *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940); *Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 118 Atl. 339, aff'd, 260 U.S. 245, 43 S. Ct. 83 (1922); *Germania Life Ins. Co. v. Commonwealth*, 85 Pa. 513 (1877).

In the instant case, unlike *Girard*, supra, the competition between the taxed and nontaxed classes does not affect the entirety of their business but merely one segment. Having concluded that life insurance companies have attributes sufficiently different from non-life companies to justify distinctive tax treatment, and, having also concluded that a competitive disadvantage resulting from such treatment does not in and of itself violate the equal protection and uniformity clauses, we can not conclude

that any such disadvantage which may arise by reason of the Act of 1961 amounts to a constitutional violation.

Appellant relies upon *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 54 S. Ct. 830 (1934), in support of its contention that the fact of competition between the taxed and nontaxed subjects invalidates the Act of 1961. In *Concordia*, supra, a tax imposed upon foreign companies which conducted both fire and casualty insurance businesses, but not upon foreign casualty companies was held invalid as applied to the proceeds from the casualty business of those companies which sold both types of insurance coverage. After careful consideration of the majority opinion in *Concordia*, we can not conclude that the Supreme Court of the United States intended therein to overrule by implication many previous decisions and to establish a rule that any tax imposed upon one class but not upon another which may partially compete with it is arbitrary per se. Our conclusion is reinforced by the subsequent decision in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437 (1959). In *Allied Stores*, the tax was sustained although the classification made therein had just such competitive implications as is presently complained of with respect to the Act of 1961. Most significantly, in sustaining the tax, the Supreme Court relied upon numerous pre-*Concordia* decisions in which the classifications made resulted in competitive disadvantages. Among the authorities so relied upon were: *State Bd. of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 51 S. Ct. 540 (1931); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83 (1922); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S. Ct. 370 (1916); *Quong Wing v. Kirkendall*,

223 U.S. 59, 32 S. Ct. 192 (1912); *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 21 S. Ct. 43 (1900).

In *Union Bank & Trust Co. v. Phelps*, 288 U.S. 181, 53 S. Ct. 321 (1933), decided one year prior to *Concordia*, the Supreme Court of the United States directed itself squarely to the issue of whether companies which compete must be taxed alike. In sustaining a classification for purposes of taxation between building and loan associations and commercial banks, the Court stated: "Mere competition between them is not enough to show [that] two concerns must be burdened alike. The . . . Legislature reasonably might have determined that there was fair ground for distinction [between them] . . . ." *Union Bank & Trust Co. v. Phelps*, supra, at 186, 53 S. Ct. at 322. Concluding that it was unable to deem such distinction arbitrary, capricious, or wholly unreasonable, it sustained the tax. This decision has never been overruled and has been cited subsequent to the decision in *Concordia* for the proposition that mere competition does not invalidate an otherwise proper classification.[17] In light of these considerations, we are unable to conclude that *Concordia* forecloses the classification made by the Act of 1961.

Moreover, Mr. Justice Cardozo, joined by Justices Brandeis and Stone, in dissenting in part in *Concordia*, succinctly demonstrated the weakness of the position advanced by appellant: "A tax upon the receipts of a business is not invalid as of course because some forms of business are hit and others are exempt. To bring about that result the assailant of the tax must be able to satisfy

[17] *Alabama State Federation of Labor, Local 103 v. McAdory*, 325 U.S. 450, 472, 65 S. Ct. 1384, 1395 (1945).

the court that the classification had its origin in nothing better than whim and fantasy, a tyrannical exercise of arbitrary power. This is the heavy burden that the appellant must sustain. Is it a whimsical and fantastic act to tax foreign fire insurance companies upon all their net receipts, including those derived from casualty premiums, when no such tax is imposed upon the receipts of insurance companies that do a casualty business only? If so, the arbitrary quality of the division must have its origin in the fact that the activities of the one class overlap to some extent the activities of the other. But plainly there is no rule that overlapping classes can never be established in the realm of taxation . . . . The recognition of such a rule means that a department store may not be taxed on the net receipts of its business unless all the many activities thus brought under a single roof are taxed in the same way when separately conducted. There must be a tax on the business of the draper, the jeweler, the shoemaker, the hatter, the carpet dealer, and what not. For the same reason, the proprietor of a retail market dealing in meats and groceries and vegetables and fruits will then escape, at least proportionately, a tax upon receipts if the statute does not cover the business of the shopkeeper who derives a modest income from the sale of peanuts and bananas. There are few taxes upon earnings that would pass so fine a sieve." *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 550, 554-55, 54 S. Ct. 830, 836, 837-38 (1934). (Citations omitted.)

We are unable to find such whim or capricious action on the part of the Legislature in the present classification to justify the conclusion that appellant's constitutional rights have been violated. The classification in

the Act of 1961 may not be deemed arbitrary or capricious if any state of facts reasonably can be conceived that would sustain it. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528, 79 S. Ct. 437, 441 (1959); *State Bd. of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 51 S. Ct. 540, 543 (1931); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357, 36 S. Ct. 370, 374 (1916); *Quong Wing v. Kirkendall*, 223 U.S. 59, 32 S. Ct. 192 (1912); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 340 (1911). "The state is not called upon to explain the reasons for taxing the members of one class more heavily than it does the members of . . . [another]. The burden is on the appellant who would strike the statute down, and not on the state which invokes the presumption of validity. . . ." *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 550, 558, 54 S. Ct. 830, 836, 839 (1934). (Cardozo, J., dissenting in part.) (Citations omitted.) In our view, appellant has not met its burden of establishing that the classification made by the Act of 1961 clearly, palpably and plainly violates the state and federal constitutions. Cf. *Chartiers Valley Jt. Schools v. Allegheny County Bd. of School Dir's*, 418 Pa. 520, 540, 211 A. 2d 487, 501 (1965).

Appellant's final contention is that the taxing departments and the court below erred in requiring the inclusion in its taxable income of premiums received on policies sold prior to 1961. It urges that the Act of 1961 imposes a tax only upon premiums derived from insurance contracts *entered into* during the taxable year and not, as the Commonwealth contends, upon all premiums *received* during that period.

The Act imposes a tax at the rate of 2% upon "the gross premiums received from business done within . . .

[the] Commonwealth during the taxable year." Act of February 21, 1961, P. L. 33, §2, 72 P.S. §2270.2. Appellant seeks a construction which would limit the meaning of the term "business done . . . during the taxable year" to include only premiums received from sales made within that period. We conclude, as did the court below, that the language may not be given so restrictive a meaning.

The construction urged by appellant would limit the taxation to premiums received from policies initially issued during the taxable year and exclude all premiums subsequently received. We can not read the explicit language of the Act to so insulate from taxation those remaining aspects of the overall insurance transaction. Moreover, the receipt of renewal premiums in practical effect amounts to no more than the resale of insurance coverage for an additional period of time. As the court below noted, "appellant's business is broader than just selling policies; it also extends to the collection of premiums whether in the year in which the policy is sold initially or in subsequent years on the renewal of the policy."[18] We agree and conclude therefore, that the court below correctly interpreted the language of the statute.

Judgment affirmed.

Mr. Chief Justice Bell dissents.

Mr. Justice Cohen took no part in the consideration or decision of this case.

---

[18] *Commonwealth v. Life Assurance Co. of Pa.*, 83 Dauphin Co. Rpts. 93, 99 (1964). It is significant to note that the disputed language has more traditionally been deemed relevant to the issue of the territorial scope of taxation for purposes of the commerce clause, U. S. Const. art. 1, §8, cl. 3, and the due process clause, U. S. Const. amend. XIV, §1, of the federal constitution.

## APPENDIX B

### AN ACT

Imposing a State tax on gross premiums, premium deposits, and assessments received from business transacted within this Commonwealth by certain insurance companies, associations, and exchanges; requiring the filing of annual and tentative reports and the computation and payment of tax; providing for the rights, powers and duties of the Department of Revenue, the taxpayers and officers thereof; and providing penalties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Definitions—The following terms, when used in this act, shall have the meaning ascribed to them in this section:

"Department" means the Department of Revenue.

"Insurance Company" means every insurance company, association or exchange, incorporated or organized by or under the laws of other states or foreign governments, and engaged in transacting insurance business of any kind or classification within this Commonwealth; and every life insurance company, or limited life insurance company, incorporated or organized by or under any law of this Commonwealth, except purely mutual beneficial associations whose funds for the benefit of members and families or heirs are made up entirely of the weekly,

monthly, quarterly, semi-annual or annual contributions to their members and the accumulated interest thereon.

"Gross Premiums" means premiums, premium deposits or assessments received by any insurance company, whether received in money or in the form of notes, credits, or any other substitutes for money, and whether collected in this Commonwealth or elsewhere. Gross premiums shall not include: (a) amounts returned on policies canceled or not taken; (b) premiums received for reinsurance; (c) in the case of mutual insurance companies, associations, exchanges, and stock companies with participating features, that portion of the advanced premiums, premium deposits or assessments returned in cash or credited to members or policyholders, whether as dividends, earnings, savings, or return deposits, upon the expiration or termination of their contracts; and (d) notes or other obligations received by mutual insurance companies to secure contingent premium liabilities to the extent that no assessment has been made and collected against said notes or obligations.

Section 2. Imposition of Tax—Every insurance company, as herein defined, transacting business in the Commonwealth of Pennsylvania, shall pay to the Department, in addition to any other taxes for which it may be liable, a tax at the rate of two percentum (2%) of the gross premiums received from business done within this Commonwealth during each calendar year.

Section 3. Annual Report—Every insurance company shall make a report to the Department, on a form prescribed by it, on or before the fifteenth day of April of each year, showing the gross premiums received from busi-

ness transacted in the Commonwealth during the year ending the thirty-first day of December preceding. When making such report, the insurance company shall compute and pay to the Commonwealth the tax upon the gross premiums received from business transacted within this Commonwealth during such preceding year.

Section 4. Tentative Report—On or before the thirtieth day of April of each year, every life insurance company and every limited life insurance company shall also file a tentative report for the current calendar year, which shall set forth either; (1) the amount of gross premiums received in the calendar year next preceding and reported in the annual report; or (2) the gross premiums received within the first three months of the current calendar year; and (3) such other information as the Department may require. Upon the date its tentative report is required herein to be made, the life insurance company or limited life insurance company shall compute and pay to the Department on account of tax due for the current year, at its election, (1) not less than one and six-tenths percentum (1.6%) of its gross premiums reported for the entire preceding calendar year, or (2) not less than six and four-tenths percentum (6.4%) upon the amount of gross premiums received during the first three months of the current calendar year. In the event that the company has not filed an annual report for the preceding calendar year because it was not subject to tax on its gross premiums, its tentative report may be based upon the gross premiums which would have been reported during the preceding year if it had been subject to tax thereon.

The amount of tax paid with the tentative report shall be credited against the tax finally determined to be due for

the current year under the annual report filed in the succeeding year.

Section 5. Settlements, Resettlements and Appeals—All taxes due under this act shall be settled by the Department, with the approval of the Department of the Auditor General, and such settlement shall be subject to resettlement, review, appeal and refund to the same extent and in the same manner as is now provided by law for the settlement, resettlement, review, appeal and refund of capital stock and franchise taxes imposed upon corporations. If the officers of any insurance company shall neglect or refuse to make any report as herein required or shall knowingly make any false report, an additional ten percentum (10%) of the amount of the tax shall be added to the tax determined by the said Departments to be due.

The taxes imposed by this act shall bear interest at the rate of six percentum (6%) per annum from the date they are due and payable until paid: Provided, That any insurance company may pay the full amount of such tax or any part thereof, together with interest thereon, without prejudice to its right to resettlement, review, appeal or refund, as provided by law, with respect to capital stock and franchise taxes imposed on corporations.

Section 6. Powers and Duties of Department—The Department is hereby charged with the enforcement of the provisions of this act, and is hereby authorized and empowered to prescribe, adopt, promulgate and impose rules and regulations, not inconsistent with this act, relating to any matter or thing pertaining to the administration and enforcement of the provisions of this act and the col-

lection of taxes, penalties and interest imposed by this act.

The Department shall have the same powers relating to the administration or enforcement of this act, including the granting of extension of time to file reports, as are conferred upon the Department by the laws relating to capital stock and franchise taxes imposed on corporations.

Section 7. Penalties—(a) Any person who shall wilfully make a false and fraudulent report under this act shall be guilty of wilful and corrupt perjury, and, upon conviction thereof, shall be subject to punishment as provided by law. Such penalty shall be in addition to any other penalties imposed by this act.

(b) Any person who wilfully fails, neglects or refuses to make a report or to pay the tax as herein prescribed, or who shall refuse to permit the Department to examine the books, papers and records of any insurance company liable to pay tax under this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars ($1000) and costs of prosecution, or to undergo imprisonment not exceeding six (6) months, or both, in the discretion of the court. Such penalty shall be in addition to any other penalties imposed by this act.

Section 8. Disposition of Taxes—The taxes paid by foreign fire insurance companies under this act shall continue to be distributed and used for firemen's relief pension or retirement purposes, as provided by section two of the act, approved by the twenty-eighth day of June, one thousand eight hundred ninety-five (Pamphlet Laws 408), as amended; and the taxes paid by foreign casualty in-

surance companies under this act shall continue to be distributed and used for police pension, retirement or disability purposes as provided by the act, approved the twelfth day of May, one thousand nine hundred forty-three (Pamphlet Laws 259), as amended.

All other taxes received under this act shall be credited to the General Fund for general revenue purposes.

Section 9. Repeal—The following acts or parts of acts are hereby repealed:

(a) Section 24 of the act approved the first day of June, one thousand eight hundred eighty-nine (Pamphlet Laws 420), entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine."

(b) The act approved the twenty-seventh day of December, one thousand nine hundred fifty-one (Pamphlet Laws 1799), entitled "An act to amend the act, approved the first day of June, one thousand eight hundred eighty-nine (Pamphlet Laws 420), entitled 'A further supplement to an act entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine,' with respect to the State tax on gross premiums, premium deposits and assessments received from insurance business transacted within this Commonwealth."

(c) The act approved the twenty-second day of April, one thousand nine hundred fifty-three (Pamphlet Laws 184), entitled "An act to continue the imposition of tax on gross premiums, premium deposits and assessments re-

ceived from business transacted within this Commonwealth by foreign insurance companies, associations and exchanges."

Provided, however, that the said acts shall remain in force and effect as to taxes imposable and collectible on gross premiums received during any period prior to January 1, 1961, and as to any reports required to be filed on or before April 15, 1961.

Section 10. Effective Date—This act shall become effective March 1, 1961, and shall apply to gross premiums received on and after January 1, 1961. The first annual reports under this act shall be due on April 15, 1962. The first tentative reports hereunder shall be due on April 30, 1961.

Approved—The 21st day of February, A.D. 1961.

DAVID L. LAWRENCE